
U. S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
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CASE NO: 84-ERA-15

In the Matter of

STEVEN LOCKERT
Complainant

v.

PULLMAN POWER PRODUCTS CORP.
Respondent

RECOMMENDED DECISION AND ORDER ON REMAND

Complainant Steven Lockert commenced this proceeding under the Energy Reorganization Act of 1974, as amended, (42 U.S.C. § 5851), hereinafter referred to as the Act. He initially filed the complaint, dated January 9, 1984, with Secretary of Labor on January 20, 1984.

February 2, 1984, the Department of Labor, Employment Standards Administration, Wage and Hour Division notified the Respondent, Pullman Power Products Corporation, that their investigation revealed that the Act was violated when Complainant

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was terminated from his employment with Respondent on December 15, 1983, and indicated that Complainant is entitled to reinstatement to his former position, together with back wages for the period that Complainant was not employed together with attorneys fees.[1]

Respondent received the aforesaid notification on February 25, 1984 and appealed the Decision on February 29, 1984. The case was transferred by the Office of Administrative Law Judges from Washington. D.C. to San Francisco, California on March 5, 1984, and a hearing was scheduled pursuant to Notice issued May 11, 1984 Counsel for Claimant filed an appearance on June 8, 1984. The hearing was held on July 11th and 12th, 1984 in San Luis Obispo California.

The Recommended Decision and order was issued by the undersigned on October 5, 1984. On September 12, 1985, the undersigned received the Decision and Order of the Secretary of Labor dated August 19, 1985 remanding the matter to the undersigned for reconsideration.

The Decision of the Secretary, in essence, concluded that I was in error in my initial finding that Steven Lockert, in raising safety and quality questions internally to one's Employer, was not engaged in protected activity under the Energy Reorganization Act of 1974. The Secretary held that my conclusion, in this regard, was inconsistent with the Decision of the Ninth Circuit Court of Appeals, *Mackowiak v. University Nuclear Systems. Inc.*, 735 F. 2d 1159 (1984); *Phillips v. Department of Interior Board of Mine Appeals*, 500 F.2d 772 (D.C. 4). Notwithstanding, my finding that the aforesaid cases were distinguishable, the Secretary of Labor held that the Administrative Law Judge was without authority to disregard the holdings in said cases to the effect that a Complainant, such as Steven Lockert, in raising safety and quality questions internally to one's Employer is engaged in protected activity under the Act. Such conclusion by the Secretary is within his prerogative, and that issue is deemed resolved.

In the initial Recommended Decision and Order and in anticipation that reasonable men might differ over the applicability and precedential effect of the *Mackowiak* decision, I addressed the question of the propriety of Complainant's discharge on the assumption that Complainant had been engaged in protected activity under the Act. The Secretary of Labor remanded the matter

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for a more detailed analysis of the protected activity engaged in by the Complainant, and a discussion of the statements and actions of the parties in connection with the protected activity. In compliance with the terms of the remand, I submit the following Recommended Decision and Order.

Steven Lockert was a Quality Control Inspector for Pullman Power Products Corporation at the Diablo Canyon Nuclear Power Plant, Avila Beach, California from July 25, 1983 to December 15, 1983. His duties consisted of performing inspection of welding work performed by, craft workers, verifying hardware procedures and work pursuant to appropriate required codes and standards.

Respondent had approximately 2,000 employees at the job site of which 250 were involved in quality control and assurance work. Approximately 120 to 125 of the employees, at the relevant times, were quality control inspectors. The essential function of quality control personnel is to perform visual examination of work to assure correct installation. Personnel assigned to quality assurance matters review the necessary paper work both before and after the craft work. Complainant was one of the quality control welding inspectors at the time of his discharge.

As part of his duties, Complainant was required to record and report work which constitutes non-conformance in what are known as Discrepancy Reports (DR). He also prepared Deficient Condition Notices (DCN) identifying possible deficient conditions and recommended Steps to Prevent Recurrence (STPR) of deficient conditions.

Complainant was an employee paid to inspect welding craft work and to prepare documents such as DR, DCN, and STPR as part of an overall program of assuring quality control of the work at the job site.

Complainant's immediate supervisor was James Cunningham. Mr. Cunningham was responsible to Russell Nolle, who in turn was responsible to Frank Lyautey. Harold Karner was the manager of all the aforesaid, as he was field quality assurance and quality control manager.

Complainant asserted and testified that he reported to his supervisors a series of discrepancies in the course of his inspection duties which resulted in adverse reactions of his

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supervisors, and argues that such was the motivation for his termination.

The series of discrepancies referred to by Complainant occurred between September 1, 1983 and December 14, 1983. There were approximately eleven to twelve discrepancies which he alleged resulted in adverse reactions on the part of his supervisors and which he asserts was the basis for his termination. The discrepancies included such matters as alleged failure of welders to use and check the appropriate gas flow rates, failure of welding equipment to meet specifications, improper welding procedures, improper modification of "fill-it" welds, use of defective bolts, inability to gain access to check full penetration welds, electrode storage allegedly in violation of code, improper rupture restraints, and alleged failure to provide appropriate quality control coverage of welders certification testing. In connection with these discrepancies which were limited to only the discrepancies to which Complainant asserted that his supervisor's reacted in an adverse fashion, the Respondent did not dispute their occurrence and further acknowledged that such discrepancies were not frivolous, but rather were of a substantial and serious nature. It should be noted that Complainant had submitted twenty to twenty-two discrepancies between July, 1983 and his termination, and as a consequence

approximately half of the discrepancies resulted in differences of opinion, and what Complainant has described as adverse reactions. The number of discrepancies which Complainant filed with his supervisors was not unusual for this period of time. Because of the acknowledgment of the Respondent at the hearing with reference to the discrepancies resulting in an adverse reaction or difference of opinion by Complainant's supervisors further analysis is unwarranted because such matters were not disputed.

Since the discrepancies reported by Mr. Lockert which resulted in adverse reactions were acknowledged, this evidence by itself is sufficient circumstantial evidence to support a finding that the Respondent had a retaliatory motive for discharging Complainant. The presence or absence of a retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive. *Mackowiak v. University Nuclear Systems, Inc., supra*. The burden thereafter shifted to the Respondent and detailed analysis is required to determine whether the termination of Complainant was motivated by the undisputed protected conduct of

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Complainant.

The expressions of concern and reports of discrepancies submitted by Complainant to his supervisory personnel was the very function for which Complainant was employed as a Quality Control Inspector. In essence, he was performing the job which he was employed to accomplish. In addition, the nature of the reports were not unique. It was repeatedly emphasized at the hearing from a variety of witnesses that the Complainant was a qualified, conscientious employee accomplishing his job in an expected manner and was not engaged in any extraordinary, abrasive behavior or otherwise involved in unusual personality conflicts at the job site. The very nature of the work of a quality control inspector may result in friction and differences of opinion between the craft personnel (welders) and the inspectors who are paid to pass judgment on the quality of work performed. Similarly, the subjective nature of the work of a quality control inspector may result in differences of opinion between an inspector, such as Complainant, and his supervisory personnel. In his case, although some of the discrepancies and/or deficiencies called to the attention of supervisors by Complainant were disagreed with by such supervisors, there was no evidence that the discrepancies, as outlined by the Complainant, were unreasonable or of a frivolous nature. Nor was there any evidence that the disagreements, as expressed by the supervisors, were unreasonable. Complainant, himself, acknowledged that in dealing with possible violations of standards, reasonable men may have differences of opinion and such matters are commonly subject to disagreement.

Of particular significance to the undersigned, and what is felt as corroborative evidence of the fact that Complainant was a conscientious, qualified employee performing his duties in the manner expected of him, and viewed as such his supervisors,

Complainant was recommended by his supervisors for a merit increase in pay in early December, 1983. All of the discrepancies reported which resulted in an adverse reaction, with the exception of one, on December 8, 1983, had preceded the Complainant's merit increase in early December, 1983.

The award of the merit increase to the Complainant is circumstantial evidence that the termination of Complainant on December 15, 1983 was not related to their prior admitted disagreements regarding discrepancies. It is unlikely that an employer would award Complainant a discretionary merit increase in

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pay if it harbored a retaliatory motive against Complainant for his reported discrepancies to which they disagreed and exhibited an adverse reaction. It is essential to carefully weigh the circumstances surrounding the termination of Complainant to determine whether the Respondent's decision to terminate was motivated by the admitted protected conduct of Complainant.

On October 17, 1983, the Complainant was observed by Mr. Karner in Mr. Karner's office researching some material. Mr. Karner asked Russell Nolle to check out where Complainant was supposed to be, since Mr. Karner felt that Complainant being in his office was unnecessary. Mr. Nolle and Mr. Karner had been receiving complaints that the craft (welders) were being held up in their work when inspectors, such as Complainant, were out of their assigned work areas. Apparently, the craft workers cannot proceed with their work unless an inspector is present to approve the quality of their work as it progresses.

Mr. Nolle warned Complainant, at that time, that in being in Mr. Karner's office, notwithstanding the reason, he was away from his assigned work area and if it happened again he would be terminated from his employment.

On December 14, 1983, at approximately 6:30 a.m., James Cummingham, Complainant's lead man, told Complainant he was assigned to "area ten" to work. Complainant requested and was given permission to complete the appropriate paper work for two STPR's and to go to containment two for such purposes. Mr. Cunningham testified that he gave such permission as he estimated it would take about half an hour for Complainant to complete such paper work and that Complainant would be able to get to area ten by 7:15 to 7:30 a.m. Apparently, Mr. Lockert completed the two STPR's and decided to accomplish some other administrative paper work and duties and did not reappear at the quality control office until approximately 9:20 a.m. Jeff Charbaneau, a supervisor, reprimanded him for not being in his assigned work area ten and that his absence had held up production. Complainant apologized for the situation and left to cover area ten as assigned. Mr. Charbaneau did not take any disciplinary action as he was not Complainant's regular supervisor and Russell Nolle, who was, was not at work on December 14, 1983.

The evidence established that the fabrication shop in area ten needed a quality control inspector and Pat Watson arranged with

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[Page 7]

Mr. Cunningham to have Complainant cover the situation on December 14, 1983. Area ten kept calling Pat Watson, almost every half hour thereafter, that Complainant had not arrived and they needed someone right away. Complainant's absence from area ten delayed the work on a ruptured restraint project and no other qualified man was apparently available.

At approximately 7:00 a.m., after the first inquiry by area ten personnel as to the whereabouts of Complainant, Pat Watson contacted Joseph Watson. Joseph Watson contacted James Cunningham who told him that Complainant had some paper work to complete in containment two and then would head-on down to the area ten fabrication shop. At approximately 7:40 a.m. Pat Watson again called Joseph Watson inquiring as to the location of Complainant, and again at 8:10 a.m. a similar telephone call was made. Joseph Watson contacted James Cunningham who replied that he was unable to locate Complainant.

James Cunningham testified that if he had known that Complainant was going to accomplish tasks other than the completion of the two STPR'S, he would have told Complainant to do it at another time or he would have gotten another man to cover area ten on the morning of December 14, 1983. He further testified that after 8:00 a.m., he went looking for Complainant because of the urgency expressed by area ten personnel, but was unable to find him. He later stated that he had seen Complainant between 7:30 and 7:45 a.m., but was not looking for him at that time, which is curious, since he knew it was beyond the time that he orginally expected Complainant to be at area ten. There is a serious question as to how diligent Mr. Cunningham's efforts were in attempting to locate Complainant during his absence from the assigned work area ten. Mr. Cunningham's failure to leave a message for Complainant, search for him or make inquiry of others in containment two renders his testimony in this regard suspect.

Complainant's supervisor, Russell Nolle, was not present during the events of December 14, 1983, but when he was informed on December 15, 1983, he got particularly upset and he decided to terminate Complainant from his employment and report the matter to Harold Karner. Mr. Nolle apparently was upset that one of his men had held up production by not being at his assigned work area and particularly because Complainant was warned once before, by him, in mid-October about the same behavior and. had been told at that time that if it happened again he would be terminated from his employment. The discrepancy reports of Complainant did not enter

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[Page 8]

in his decision.

The rules in existence at the job site provide that an employee who leaves assigned work areas without authorization is subject to termination and is not eligible for rehiring. Although, there was no evidence of any other employee being terminated for such reason, there similarly was no evidence of any other employee committing such a violation of an equivalent duration.

When Mr. Karner was told by Mr. Nolle of the events of December 14, 1983, and of Mr. Nolle's recommendation that Complainant be fired, Mr. Karner told Mr. Nolle to document the events and he would utimately make the decision. such was done and Mr. Karner, as quality control manager, made the decision to terminate Complainant. The sole basis of the termination, according to Mr. Nolle and Mr. Karner was Complainant's absence from his assigned work area on December 14, 1983. The actual decision to terminate Complainant for this reason was that of Mr. Karner based upon the recommendation of Mr. Nolle.

A termination notice was prepared with a description of the events and specifying that the reason for termination was failure to appear at the assigned work area for approximately three hours on December 14, 1983. At the trial, there was some confusion with reference to the termination notice because of the location of certain signatures on the document and the use of the pronoun "I". Without explanation it is difficult to determine to whom the "I" is referring. Testimony established that page one of the brief facts on the notice of termination was written by Joseph Watson who signed the document on page two and not Russell Nolle who signed on page one as supervisor because Mr. Nolle was not present at work on December 14, 1983. Page two of the termination notice was written by Jeff Charbaneau.

Complainant never reported the discrepancies and deficiencies previously referred to above, to any outside source beyond his supervisors while in employ of Respondent. He never commenced, caused to be commenced or threatened to commence a proceeding as referred to in 42 U.S.C. § 5851(a)(1), testified or was about to testify in any such proceeding or, assisted or participated or was about to assist or participate in such proceeding or any other action as referred to in 42 U.S.C. § 5851(a)(2)(3).

The denial of the motion of the Respondent to dismiss the

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matter for lack of jurisdiction was fully discussed in the original Recommended Decision and Order and such discussion is incorporated herein by reference as though fully set forth. I further note that my conclusions in this regard were adopted by the Secretary of Labor in his Decision and Order dated August 19, 1985.

Based upon the Decision and Order of the Secretary of Labor of August 19, 1985, it is deemed determined that the discrepancies reported by the Complainant between September 1, 1983 and December 14, 1983, heretofore referred to and acknowledged by the Respondent as occurring, constitute protected activity under the Act. Since the Complainant has been deemed engaged in protected activity under the Act, then the evidence must be evaluated as a case involving a "dual motive" discharge. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 2 4, 287 (1977). In such cases, the employee first has the burden of showing that his conduct was protected and that the protected conduct was a motivating factor in the employer's decision to terminate him. Complainant has met his burden, with circumstantial evidence. Thereafter the burden shifts to the employer to show by a preponderance of the evidence that it would have reached the same decision as to the employee's dismissal even if the absence of the protected conduct. *Consolidated Edison Company v. Donovan*, 673 F.2d 61 (1982). In the case at bar, the Secretary of Labor has determined that Complainant's conduct was protected and this Recommended Decision and Or er on Remand is limited to the determination of whether the protected conduct was a motivating factor in the Respondent's decision to terminate him and whether the Respondent met its burden to show by a preponderance of the evidence that it would have reached the same decision as to the Complainant's dismissal even in the absence of the protected conduct.

The question is not merely whether there exists independent and proper grounds for the termination or whether the Respondent had a legitimate reason for terminating the Complainant, but whether the Respondent would have terminated him if only the valid ground for discharge had existed. In other words, would the employee have not been dismissed "but for" his engaging in protected activity?

Applying the evidence to the aforesaid law, I find, that the safety and quality questions reported by Complainant to his supervisors is a protected activity under the Act, but I do not find that the Complainant's accomplishment of the undisputed

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protected conduct was a motivating factor in the Respondent's decision to terminate him. I further find that the Respondent has shown by a preponderance of evidence that Complainant would have been terminated for being absent from his authorized work place even in the absence of such protected conduct. Certainly, a fact-finder could determine the evidence in a fashion to come to the opposite conclusions, as the evidence is subject to credibility determinations. However, based upon my personal observations of the demeanor of the witnesses and my evaluation of their credibility I conclude in the manner stated. I cannot conclude from the evidence that the Complainant would not have been dismissed "but for" his engaging in protected activity as reported, as such a determination would require the conclusion that Mr. Nolle and Mr. Karner were less than truthful. The sole basis for Complainant's termination was Mr. Nolle's recommendation to fire Complainant for failure to appear at his assigned work area for approximately three hours on December 14, 1983. Mr. Nolle was a persuasive witness in this regard and he

impressed me as an honest, hard working foreman with perhaps a tendency to overreact, but who testified regarding his actions without malice, duplicity, or mendacity. Mr. Nolle was not above using abusive language towards Complainant. He used such language towards all employees without discrimination and therefore it was not reflective of ill will towards the Complainant. A case such as this can never be determined by the number of witnesses, but on the quality and credibility of any one or a number of witnesses.

In this case, I believe Mr. Nolle and Mr. Karner as to the reason for which the Complainant was terminated. The evidence presented by the Complainant, on the other hand that the Respondent's recited reason for the termination was an excuse in order to fire him for the reasons that he had reported safety discrepancies and deficiencies or that such activities were a moving cause of the termination was not persuasive when evaluated against the direct testimony of Mr. Nolle and Mr. Karner to the contrary. As stated, perhaps another fact-finder would have come to the opposite conclusions from those which I recommend, but my obligation as an independent trier of fact is to draw conclusions based upon the evidence presented and the credibility of the witnesses who have testified and whom I have observed in such proceedings. It is on this basis and in fulfilling the function to which I have been assigned that I make these determinations.

The evidence demonstrates that Mr. Nolle and Mr. Karner

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terminated Complainant for the sole reason given, notwithstanding conflicting circumstanial evidence which might support a finding to the contrary. The credibility of Mr. Nolle and Mr. Karner was unimpeached. One might well disagree with their decision to terminate the Complainant as I am sympathetic with Complainant who impressed me as a conscientious, qualified worker who was the victim of a combination of circumstances the responsibility for which must be placed at the feet of James Cunningham. Mr. Cunningham authorized Complainant to go to containment two on December 14, 1983 prior to his reporting to area ten where he was assigned to work, as Mr. Cunningham anticipated that Complainant would be able to go to the assigned area ten by 7:15 to 7:30 a.m. Mr. Cunningham's testimony was unconvincing as to the efforts he made to earnestly locate Complainant after area ten personnel were frantically calling as to Complainant's whereabouts. I find Mr. Cunningham's testimony unbelievable in this regard and my observations of him lead me to conclude that he was less than truthful in his testimony. Although I believe the penalty of termination was unduly harsh in view of the surrounding circumstances and the cavalier behavior of Mr. Cunningham, it is and was a management prerogative and not my function to superimpose my judgment to the contrary in the absence of a violation of the Act. Pursuant to the directions of the Secretary of Labor as set forth in his Decision and Order of August 19, 1985, I have carefully reconsidered and applied the legal principles as directed and submit this recommended decision.

RECOMMENDED ORDER

It is hereby recommended that the complaint of Steven Lockert be dismissed with prejudice.

HENRY B. LASKY
Administrative Law Judge

Dated: 04 OCT 1985
San Francisco, California

HBL:bjh

[ENDNOTES]

[1] The file reflects that Complainant was representing himself and did not secure the services of an attorney for the purposes of filing his complaint. Consequently, the basis for the award of attorneys fees is unknown.